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No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1942

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDIANA & MICHIGAN ELECTRIC COMPANY, AND MICHIANA ELECTRICAL UTILITY WORKERS ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 866–876) is reported in 124 F. (2d) 50. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 140–170) are reported in 20 N. L. R. B. 989.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on December 12, 1941 (R. 866). An order extending the time within which to file a petition

for a writ of certiorari to and including April 11, 1942, was signed by a Justice of this Court on March 9, 1942 (R. 887). The petition for a writ of certiorari was filed on April 11, 1942, and was granted on May 25, 1942 (R. 888). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board lacks jurisdiction to hear a case involving unfair labor practices if the charge is filed by a union which has engaged in unlawful conduct, and whether accordingly, it can be required to hear evidence of alleged unlawful conduct to establish whether or not it lacks jurisdiction.

2. Whether, in the circumstances of this case, the court below acted arbitrarily in remanding the case to the Board in order to consider the proffered evidence as it related to the credibility of certain witnesses.

3. Whether the findings of the Board that the Company violated Section 8 (1) and (2) of the Act are supported by substantial evidence.

STATUTE AND RULES INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Rules and Regulations of the National Labor Relations Board are set forth in Appendix A.

STATEMENT

Upon charges and amended charges (R. 30–31) filed by the International Brotherhood of Electrical Workers, Local B–9, a labor organization affiliated with the American Federation of Labor and hereinafter called the Brotherhood, the Board on November 12, 1938, issued its complaint against Indiana & Michigan Electric Company, hereinafter called the Company (R. 32–35). The complaint alleged, in substance, that the Company had initiated, interfered with, dominated, and supported Michiana Electrical Utility Workers Association, a labor organization hereinafter called the Association, and had in various ways discouraged membership in the Brotherhood, thereby violating Section 8 (1) and (2) of the Act.[1] The Company answered, denying the material allegations of the complaint (R. 38–40).

A hearing was held before a trial examiner of the Board from November 28 to December 9, 1938.[2]

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[1] The complaint also alleged that the Company had discharged an employee, Elkins, contrary to Section 8 (1) and (3), but this allegation was subsequently dismissed by the Board (R. 33–34, 166, 170).

[2] While the Association was not served with process, an attorney for the Association was present at the hearing, but he did not enter his appearance on the record (R. 136n., 632, 634–635, Orig. Trans., p. 3). Since the Association was found to be employer-dominated, it "was not a necessary party" to the proceeding, as the court below correctly held (R. 872). *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350; *Pitts-*

On July 27, 1939, the examiner issued an intermediate report finding that the Company had violated Section 8 (1) and (2) of the Act and recommending certain remedial action (R. 53–92). The Company filed exceptions (R. 93–129) and a supporting brief, and argued orally before the Board on November 9, 1939 (R. 130, 139). On February 19, 1940, the Company filed a petition requesting the Board to reopen the case and receive further evidence concerning certain crimes allegedly committed against the Company's property by officers of the Brotherhood and agents of such officers (R. 130–135). This evidence was proffered in order to show that the Board proceeding did not involve "a bona fide and good faith controversy * * * with reference to unfair labor practices committed by" the Company (R. 131), and also to show that three of the persons who had testified for the Board at the hearing were involved in the crimes and therefore were unworthy of belief (R. 130–131, 133–134).

On February 28, 1940, the Board issued its decision denying the petition to reopen (R. 139) and setting forth its findings of fact, conclusions of law, and order (R. 140–170). The detailed evidentiary findings and the testimony supporting them are presented in detail in our Argument, *infra*, pp. 11–25. The bare outline of the Board's findings may be summarized as follows:

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burgh Plate Glass Co. v. *National Labor Relations Board*, 313 U. S. 146.

In April 1937, when the Brotherhood and a C. I. O. union sought to organize the Company's employees, high-ranking supervisors subjected a widely publicized meeting of the Brotherhood to surveillance, and Harter, a crew foreman, interrogated his subordinate employees in order to force them to "admit" they had attended the meeting (R. 142–144). Harter then undertook the organization of the Association, a union confined to the Company's employees, primarily as an instrument with which to forestall the campaigns of the Brotherhood and the C. I. O. union; to accomplish this, Harter enlisted the assistance of other foremen (R. 144–145, 164). Thereafter many supervisors of varying ranks actively participated in creating, organizing and developing the Association: They served as officers of the Association (R. 148, 149, 150–151, 164); they were prominent in calling and advertising its organizational meetings (R. 145–148), in drafting its by-laws (R. 149–150, 164), in conducting its elections (R. 150–151, 164), and in soliciting membership and collecting dues (R. 145–146, 148–149, 154, 155, 157, 158–159, 162, 165). The Company in turn promptly accorded the Association recognition (R. 149, 151–152, 164); it also granted the Association a wage increase after the Association pointed out that otherwise it would be a "flop" (R. 153–154, 164–165).[3]

[3] The Board further noted that under the contract between the Company and the Association, as well as under the Association's by-laws, the grievance machinery was such

The Board found that the supervisors who participated in the campaign against the Brotherhood and in the organization of the Association were representatives of management for whose activities the Company was chargeable (R. 154–165). It concluded that the Company had violated Section 8 (1) and (2) of the Act (R. 143, 144, 165–166, 168–169), and ordered the Company to cease and desist from its unfair practices, to disestablish the Association, and to post notices (R. 167–168, 169–170).[4]

On December 13, 1940, the Board petitioned the court below for enforcement of its order (R. 1–5).[5] On July 29, 1941, the Company filed with the court below a petition, under Section 10 (e) of the Act, requesting that the case be remanded to the Board for the taking of substantially the same additional evidence as that which the Company on February 19, 1940, had requested the Board to receive (R. 852–855; *supra*, p. 4). On August 29, 1941, the Board filed a reply brief and opposition to the Company's petition (R. 855–863). On October 17, 1941, the court passed the disposition of the peti-

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that the Company, through its supervisors, was in effect represented on both sides of the bargaining table (R. 154, 162, 164).

[4] The Board requests and consents, as it did in the court below, that the notices provision (R. 170) be modified to conform to its present practice by changing paragraph 2 (b) (1) so that it shall read: "(1) that the respondent will not engage in the practices from which it is ordered to cease and desist in paragraphs 1 (a), (b), (c), and (d) of this Order."

[5] The Association was apparently permitted to intervene (R. 863–865, 868–869).

tion to the argument on the merits of the cause (R. 863). On December 12, 1941, the court handed down its opinion and on the same day entered a decree remanding the cause to the Board with directions to hear and consider additional evidence concerning the destruction of the Company's property by the Brotherhood or its agents or representatives (R. 866–876). The Board's motion to file a petition for rehearing out of time was denied on March 5, 1942 (R. 877–887). On March 9, 1942, Mr. Justice Reed extended to April 11, 1942, the time in which the Board could file a petition for certiorari (R. 887). On April 11, 1942, the Board filed a petition for certiorari which was granted on May 25, 1942 (R. 888).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in remanding the case to the Board for the taking of additional evidence concerning the unlawful conduct of the Brotherhood or its representatives.

2. The court below erred in failing to enforce the order of the Board with the modification of the notices provision consented to by the Board.

SUMMARY OF ARGUMENT

The court below remanded the case to the Board to consider additional evidence concerning alleged misconduct of the Brotherhood or its representatives. This was error (Point II). Upon the existing record, the Board's findings are supported

by substantial evidence and its order is entitled to enforcement (Point I).

I

In outline the evidence shows: When outside unions sought to organize the employees, supervisors opposed the movement through surveillance and interrogation. Supervisors contemporaneously organized the Association for the express purpose of forestalling outside organizations. Many supervisors of varying ranks participated in this movement: They served as officers of the Association, called and advertised its organizational meetings, drafted its by-laws, conducted its elections, solicited membership, and collected dues. The Company promptly accorded recognition to the Association, and sought to bolster the new organization through a wage increase.

The Board was warranted in finding that the supervisors who thus acted on behalf of the Association were management representatives for whose conduct the Company is chargeable. The supervisors had been vested by the Company with authority over their fellows; this, and the circumstance that a large number of men with such authority acted in concert to install the inside organization and oppose outside ones, led the other employees reasonably to believe that the Company desired an inside union. The Company is therefore answerable for their actions. *International*

Association of Machinists v. *National Labor Relations Board,* 311 U. S. 72; *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584; *National Labor Relations Board* v. *Virginia Electric & Power Co.,* 314 U. S. 469; *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.,* 315 U. S. 282. The findings of violation of Section 8 (1) and (2) thus are, upon the existing record, proper.

II

The court below was in error in remanding the case to the Board. The proffered evidence of misconduct of the Brotherhood was irrelevant to the question whether it could file a charge and whether the Board could issue a complaint of unfair labor practices against the Company. Even if, as the court below assumed, only a "labor organization" (or an "employee") can file a charge, the Brotherhood, despite its alleged misconduct, was plainly a "labor organization." Section 2 (5) of the Act. But even if it were not a "labor organization," it was not deprived of the right to file a charge. Both the terms of the Act and its legislative history negate the conclusion that the right to file charges is limited to "labor organizations" or "employees," or that misconduct of a charging union is a bar to setting in motion the Act's machinery to remove unfair labor practices of the em-

ployer. Section 10 (b); S. Rep. No. 573, 74th Cong., 1st Sess., pp. 16–17; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 16–17. While misconduct might, in certain cases, be relevant to the Board's choice of a remedial order—as, for example, where the question is whether the employer should be required to bargain with a union guilty of misconduct, or should be required to reinstate employees connected with misconduct—no such issue is presented here. For here the Brotherhood is not the beneficiary of the Board's order nor even mentioned therein. The order simply requires the employer to cease and desist from unfair practices and to disestablish a dominated union. Misconduct of the Brotherhood has no relevancy to these remedial provisions. If, as the court below held, the misconduct of the charging union wholly ousts the Board of jurisdiction, the result is not to further but to subvert the policies of the Act by encouraging resort to economic force instead of to the peaceful processes of the Act. The decisions of this Court and of various circuit courts of appeals support the view that the processes of the Act may be invoked by a union which has been guilty of misconduct. *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31.

The second ground assigned by the court for the remand, that it might result in the impeachment of three witnesses, is also without merit. The testimony of these witnesses was either cumulative or

immaterial, so that their impeachment could not affect the Board's decision.

ARGUMENT

I

THE BOARD'S FINDINGS OF INTERFERENCE WITH SELF-ORGANIZATION, AND OF DOMINATION, INTERFERENCE WITH, AND SUPPORT OF THE ASSOCIATION ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The Board found that the Company interfered with its employees in the exercise of their rights of self-organization, and dominated, interfered with, and supported the Association, in violation of Section 8 (1) and (2) of the Act (R. 143, 144, 165–166, 168–169). The court below did not consider whether these findings are supported by substantial evidence (R. 867, 876) but instead ordered the case remanded to the Board to hear and consider additional evidence concerning alleged misconduct by the Brotherhood or its agents or representatives (*supra*, p. 7). In the second portion of our Argument (*infra*, pp. 34–52) we shall contend that the court below erred in remanding the case. In the first portion, we shall urge, in accordance with the intention expressed in our petition for certiorari (pp. 2, 11, 18–19), that upon the existing and complete record, the Board's findings and order are supported by substantial evidence and that the court below therefore erred in failing to enforce the order upon the record before it.

A. THE OPPOSITION TO OUTSIDE UNIONS AND CREATION AND ESTABLISHMENT OF THE ASSOCIATION BY THE COMPANY'S SUPERVISORS

The evidence substantially supports the Board's findings that the Company, acting through supervisory personnel for whose conduct it is responsible (*infra*, pp. 25–34), opposed "outside" unions and initiated, favored, dominated, and supported the Association.

The Company's opposition to the outside unions.—In the spring of 1937, the C. I. O. solicited membership among the Company's employees (R. 189–190). This led the Brotherhood, an A. F. of L. affiliate, to undertake an active organizational campaign which included the holding of monthly meetings (R. 180, 189–190). The Company promptly evidenced its opposition by subjecting the first Brotherhood meeting to surveillance. General Line Foreman Livelsberger and Assistant General Line Foreman Carlton, two of the Company's high-ranking supervisors,* conspicuously stationed themselves in a car outside the meeting hall and watched to see which employees entered (R. 180–182, 277–278, 348–350, 480–481, 576–578; see *infra*, p. 50, n. 40). The coercive effect of this stratagem is indicated by an employee's testimony that as soon as he saw the supervisors, he "wanted to get out of there" (R. 349). The Board properly found

* The supervisory status of the various employees referred to in this portion of the brief and the Company's responsibility for their acts are discussed *infra*, pp. 21–34.

that the supervisors by "stationing themselves outside the meeting place * * * for the purpose of scrutinizing those who entered" discouraged employees from attending the meetings, and thereby interfered with the rights of self-organization contrary to Sections 7 and 8 (1) of the Act (R. 143).

Transmission Crew Foreman Harter, one of Carlton's subordinates (Resp. Exh. 17[7]), similarly acted to discourage employee participation in the Brotherhood's organizational activities. Harter testified that he interrogated the employees in his crew concerning the Brotherhood meeting and by "drilling away" at them "pinned them down to where they had to admit" that they had attended; Harter also sought to discover "how many was to the meeting and * * * the names of different ones that was there" (R. 521–527).[8] The Board found that Foreman Harter's interrogation, like the surveillance by his superiors, clearly conveyed hostility toward the Brotherhood and interfered with the employees' right to select their own bargaining organization free of company interposition, thereby violating Section 8 (1) (R. 143–144).

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[7] This exhibit is reproduced as Appendix B, *infra*, p. 57. The original exhibit is on file with the Clerk of this Court.

[8] Harter's attitude toward the Brotherhood which he revealed to his men may be gathered from the following question and answer in his testimony (R. 524):

"Q. Did you lead them [the employees] to believe that you knew they had joined the I. B. E. W.?

"A. No, I didn't accuse them of joining it at all."

The initiation and organization of the Association:—Harter did not confine his interference to mere defensive opposition to the Brotherhood. Shortly after questioning the employees in his crew, Harter undertook to initiate an inside unaffiliated union, the Association, primarily as an instrument to oppose the outside union campaign (R. 512–515, 530, 490–491). His first step to organize the Association was to enlist the aid of other foremen in the undertaking; this he did, according to his testimony, because "your men look to the foreman as a leader" (R. 515–516, 530). The foremen whose aid Harter sought in turn joined him in the initiation of the Association because, as one of the initiators, Line Foreman La Velle, testified (R. 498–499):

> We never needed a union at the Indiana & Michigan as long as I have ever been up there to the last present years—the last four or five years, when the A. F. of L. and the C. I. O. got so strong and they was going to come in and take our little playhouse away from us; then we organized what we called the Michiana Electric Workers Association.[9]

The first organizational meeting was held on May 16 at Foreman La Velle's home and was attended by Harter, La Velle, Line Foreman Clark, Line

[9] The testimony of other supervisory employees who joined in the formation of the Association reveals that they too were motivated by a desire to prevent the growth of outside unions (R. 214, 223, 351, 490–491, 533, 581).

Foreman Daniels, and two non-supervisory employees (R. 489–490, 517, 533–534). Working rapidly to establish an inside union before the A. F. of L. or the C. I. O. should become too strong (R. 502), these six men planned a campaign to organize the Association (R. 491–496, 498–499, 517, 532, 533). Distribution Engineer Miles, a supervisory employee, joined the group of organizers (R. 493–496, 538–539), and other supervisors, Assistant General Line Foreman Carlton (who had participated in the surveillance of the Brotherhood meeting), Transmission Engineer Henderson, and Acting General Line Foreman Edgell, also entered in the enterprise, and held a second meeting, attended also by several nonsupervisory employees,[10] at Henderson's home on May 19. At this meeting a petition for recognition of the Association was drafted and arrangements were made to retain an attorney and to hold a mass meeting on the following day. (R. 199–203, 265–266, 281–285, 379, 392–396, 567–570.)

Meanwhile, between May 16 and 20, the Company's foremen and other supervisors openly solicited membership in the Association and widely advertised the forthcoming mass meeting.[11] Fore-

[10] Some of the few non-supervisory employees who attended the meeting were invited by Assistant General Line Foreman Carlton and Transmission Engineer Henderson (R. 265–266, 379).

[11] Among those who participated were: Acting General Line Foreman Edgell (R. 211–212); Foreman Harter (R. 350–352, 496, 503); Foreman Clark (R. 496, 503); Foreman

man Strock devoted two hours during the workday to a discussion in which he spoke on behalf of the formation of the Association (R. 321–323). Assistant General Line Foreman Carlton was a leading canvasser; by his own admission, during this period and thereafter, he collected some 75 or 80 membership cards (R. 582; 278, 353, 356–358, 496, 503, 508, 569).[12] As a result of this intensive campaign by the supervisory staff, about 600 employees attended the mass meeting on May 20 (R. 397). At the meeting the employees voted to form the Association, adopted the petition for recognition, and elected Safety Engineer Holmes, a supervisory employee, as temporary chairman (R. 221, 396–399, 719–722). By May 20, or shortly thereafter, membership applications in the Association had been signed by a large number of line and other foremen[13] and by many supervisors of higher rank.[14]

Daniels (R. 355, 496, 503); Foreman Strock (R. 321–323, 413, 420); Foreman Masten (R. 303–304, 317); Foreman Hildebrand (R. 262, 352); and Transmission Engineer Henderson (R. 410).

[12] Carlton's superior, General Line Foreman Livelsberger, furnished at least one employee with an Association membership card (R. 279, cf. 317).

[13] Among them were: Harter (R. 756); La Velle (R. 763); Clark (R. 745); Daniels (R. 748); Denman (R. 469, 749); Edgell (R. 750); Brewer (Resp. Exh. 17, R. 743); Chambers (Resp. Exh. 17, R. 745); Hildebrand (Resp. Exh. 17, R. 758); Hoblitzel (Resp. Exh. 17, R. 758); Howe (Resp. Exh.

After the May 20 meeting, Safety Engineer Holmes, with a committee which included several foremen, drafted the organization's by-laws (R. 228, 230–234, 708–717, 797–809).[15] Following the adoption of these by-laws on June 11, 1937, the Association held elections at meetings, two of which

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17, R. 759); Humberger (R. 759); Jefferson (R. 760); Johnson (R. 760); Landon (R. 763); Lillard (Resp. Exh. 17, R. 763); Lossee (R. 764); Masten (Resp. Exh. 17, R. 765); McClure (R. 360, 766); Miller (Resp. Exh. 17, R. 767); Mowery (Resp. Exh. 17, R. 768); Mortimore (R. 768); Myers (R. 769); Rayhorn (Resp. Exh. 17, R. 772); Rikert (Resp. Exh. 17, R. 773); Smith (Resp. Exh. 17, R. 777); Snyder (R. 777); Strock (R. 779); Thibideau (R. 780); Thornton (Resp. Exh. 17, R. 780); and Wittmack (R. 784). Thereafter various supervisors also collected dues: Acting General Line Foreman Edgell (R. 351); Foreman Strock (R. 323); Foreman Miller (R. 353–354); Foreman Lillard (R. 332, 337–338, 342, 345); and Chief Clerk Knepp (R. 354).

[14] These included Assistant General Line Foreman Carlton (R. 745); Distribution Engineers Miles, Stoudt, Thomas, and Wright (R. 767, 779, 780, 784); Valuation Engineer Zumpe (R. 784); Senior Watch Engineer Gibbons (R. 300–301, 754); General Line Foreman Brubaker (R. 459, 743); Kreimer, in charge of records and reproduction work (R. 454, 762); Chief Inspector Webb (R. 459, 782); Chief Clerk Knepp (R. 762); Assistant Superintendent R. J. Brown (R. 461, 743). The supervisory duties of these men are discussed *infra*, pp. 21–25. In its exceptions to the examiner's intermediate report, the Company admitted that the "evidence shows * * * 32 supervisory employees became members of the Association * * *" (R. 111).

[15] The by-laws committee which itself, as stated, included various foremen, decided that foremen should be eligible for membership in the Association, but cautioned that they ought "not take too active part * * * so as to make men working under them feel the union was run by higher-ups" (R. 710).

were presided over by Holmes and Henderson; supervisors were elected to various subsidiary posts, and Holmes, Edgell, and Meter Foreman Denman were chosen to serve as three of the four officers of the Association's General Council,[16] its governing body (R. 689–690, 697–703, 805–807), the functions of which were not only to bargain collectively with the Company but also to act as the final intra-Association arbiter of employee grievances (R. 802, 807, 829).

The negotiations between the Company and the Association.—On May 22, 1937, prior to the adoption of the by-laws, an Association committee of which Carlton and Henderson were members had presented a petition for recognition of the Association to the Company's officers; the committee was assured that the Association would have no difficulty in securing a contract (R. 385–386, 717–719). In August the Company suggested that before it extended formal recognition, the Association's majority representation be proved by an election (R. 826–830). The suggestion, however, was abandoned when the Company learned that the Association's status was being questioned by the Board. On September 28 the Company recognized the Association as the exclusive bargaining representative merely upon presentation of an affidavit by the Association's secretary that it represented a majority. (R. 243–244, 671–673.)

[16] Holmes was elected president (R. 698).

Thereafter, negotiations for a contract were conducted between the Company's officials and the officers of the Association's General Council (R. 833–846). Since the latter were principally supervisors, the Company was, as the Board pointed out (R. 164), "well represented on both sides of the bargaining table."[17] One of the Association's proposals was for a 15 percent wage increase (R. 823). The negotiations regarding this proposal, the Board found, "indicate the unlawful relationship obtaining between [the Company and the Association]" (R. 164–165). For, to persuade the Company to accept the proposal, the Association did not hesitate to point out to the Company that unless action was forthcoming, the Association would "be a flop" and that a "lot of men [were] much more favorable to other organizations" (R. 846). Thereafter the Company, without discussion of the Association's wage demand and considerably in advance of entering into a bargaining contract, offered to the Association, and the Association promptly accepted, a blanket 5-cent-per-hour wage increase (R. 660–661, 666–667). The Board found that the Company's "purpose in granting the increase was

[17] Evidence of the dominance of the Company's viewpoint in this group is found in the provisions of the initial proposal submitted by the General Council, drafted in large part by Holmes (R. 228, 240), which forbade "strikes, sitdowns, walkouts, or other concerted cessation of work by the Association," and expressly provided that the collective agreement should "not prohibit an employee from bargaining individually with the Company" (R. 817–818, 821).

to prevent the Association from losing its members" and that "as such it was unlawful support" (R. 165).[18]

In February 1938, over three months after the wage increase, the Company entered into an agreement with the Association, which was substantially the same as a "Declaration of Policy" which the Company submitted in December 1937 (R. 237–239, 648–654, 790–796). The grievance machinery in the agreement, as well as in the Association's by-laws, provided that grievances should in the first instance be submitted to the Company's foremen (R. 794, 802, see R. 584–585). In view of the large supervisory representation in the Association, the Board found that "there could be no arm's length bargaining under these circumstances" (R. 164).

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[18] That this was a permissible finding based on a reasonable inference is not open to question. See *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 460–461, affirming in this respect 102 F. (2d) 383, 388 (C. C. A. 7); *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. (2d) 658, 660 (C. C. A. 2); *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 172 (C. C. A. 3), certiorari denied, 308 U. S. 605; *National Labor Relations Board* v. *Williamson-Dickie Mfg. Co.*, decided July 23, 1942 (C. C. A. 5); *National Labor Relations Board* v. *W. A. Jones Foundry & Machine Co.*, 123 F. (2d) 552, 554 (C. C. A. 7); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 435 (C. C. A. 7); *Montgomery Ward & Co.* v. *National Labor Relations Board*, 107 F. (2d) 555, 558 (C. C. A. 7); *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678, 683 (C. C. A. 8); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 494 (C. C. A. 9), certiorari denied, 306 U. S. 643.

B. THE SUPERVISORY STATUS OF THOSE WHO OPPOSED THE OUTSIDE UNIONS AND CREATED AND ESTABLISHED THE ASSOCIATION

The Board found that the supervisory status of the persons who opposed the outside unions and created and established the Association was such as to make the Company answerable for their activities (R. 154–165). Before discussing the propriety of the Board's conclusion of Company responsibility (Point IC, *infra*), we shall examine the supervisory status, as shown by the record, of those persons whose activities have been described above.

Three of those whose activities have been reviewed, General Line Foreman Livelsberger, Transmission Engineer Henderson, and Safety Engineer Holmes, hold positions fourth in line of authority from the Company's general manager, English (Resp. Exh. 17,[19] R. 220, 388, 451–452, 457, 460, 462). Livelsberger has charge of 88 men including all of the crew foremen and their subordinates (Resp. Exh. 17, R. 447, 455, 457, 463–464, 565). His superior, Superintendent Dequine, sufficiently appreciated Livelsberger's high supervisory status to single him out and give him specific instructions not to violate the Act (R. 446, 447, 449). Yet Livelsberger, it will be recalled, took part in surveillance over the Brotherhood meeting immediately prior to the formation of the Association, and furnished at least one employee

[19] See *supra*, p. 13, note 7.

with an Association membership card (*supra*, pp. 12, 16).

Henderson is the company's transmission or design engineer; three engineers as well as a crew of men are subordinate to him (Resp. Exh. 17, R. 389, 407–408, 457–459). The vital role Henderson played in launching the Association by holding the May 19 meeting at his home and by arranging and advertising the May 20 mass meeting (see R. 419) has already been related (*supra*, pp. 15–16).

Holmes, the leader of the Association since its formation (*supra*, pp. 17–18), is the Company's safety engineer. He inspects the employees' compliance with safety regulations and reports violations thereof—such violations, it should be noted, constitute cause for discharge (R. 793)—in addition to conducting safety meetings among the line crews and representing the Company at safety congresses (R. 217–221, 249–250, 462).

Other supervisors who participated in organizing, soliciting for, and administering the Association also hold important stations in the management hierarchy. Thus Assistant General Line Foreman Carlton, who participated with Livelsberger in surveillance over the Brotherhood meeting and who was the leading canvasser for the Association (*supra*, pp. 12, 16), supervises four line foremen and their crews, totalling some 20 employees (Resp. Exh. 17, R. 446–447, 455, 466–467, 566–567, 579–580). In addition, in Livelsberger's

absence Carlton succeeds to most of Livelsberger's supervisory work and duties (R. 446, 485, 579).[20]

One of the original initiators of the Association who also solicited employees' membership therein was Distribution Engineer Miles (*supra*, p. 15, R. 496, 510–511, 543). Miles supervises the work of a number of engineers (Resp. Exh. 17, R. 453–455, 466, 536–537) and in Livelsberger's absence assists Carlton in performing Livelsberger's work (R. 466, 486, 579–580). Three other distribution engineers, Stoudt, Thomas, and Wright, who joined the Association during the critical period of its inception (*supra*, p. 17), collectively supervise the work of nine engineers and three draftsmen (Resp. Exh. 17, R. 453, 460, 468). Similarly Valuation Engineer Zumpe who signed an Association membership application (*supra*, p. 17) supervises the work of 35 employees and is directly responsible to General Manager English (R. 368), while Senior Watch Engineer Gibbons who also joined (*id.*) is the Superintendent of Operating Crews at Twin Branch (R. 300–301).

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[20] There resulted, therefore, the anomaly that Livelsberger was explicitly directed by the superintendent to abstain from violating the Act by influencing his employees in organizational matters (*supra*, p. 21), while Carlton, the successor to Livelsberger when Livelsberger is away, acted as the principal solicitor for the Association. As one of the line foremen stated at the hearing, at first the Association organizers were hesitant to allow Carlton to solicit for the organization because "a lot of us thought" his job was "important" (R. 508).

Other high-ranking supervisors who joined and aided the Association (*supra*, p. 17) include General Line Foreman Brubaker, the "superintendent" over the various crew foremen and their crews, whose position at Elkhart corresponds to that of Livelsberger at South Bend (R. 452, 459, 464); Kreimer, in charge of records and reproduction work, who supervises 22 employees (Resp. Exh. 17, R. 454, 462–463); Chief Inspector Webb who directs the work of seven other inspectors (Resp. Exh. 17, R. 459, 461); Chief Clerk Knepp, who handles timekeeping and is in charge of nine employees (Resp. Exh. 17, R. 354, 461–462, 762); and Assistant Superintendent Brown, with authority over 13 employees in the service and complaint department (Resp. Exh. 17, R. 461, 467–468).

In addition, as we have seen, the crew foremen, including Harter, La Velle, Clark, Daniels, Denman, and Edgell,[21] were particularly prominent in initiating and acting as leaders in the Association and a large number of them became members, solicited employees, and collected dues (*supra*, pp. 14–18). The crew foremen headed crews of as many as 10 men (R. 193, 422, 456–457, 512). Superintendent Dequine testified that they had "complete authority" over their men; that they could "give any order that has to do with the opera-

[21] Edgell, indeed, was throughout this period the acting general line foreman for the Benton Harbor Division, supervising four crew foremen and their crews (R. 192–193, 214).

tion of that crew"; that they were "responsible for the proper installation of the job"; that one of their most important functions was to know how to "handle men"; that they took care of "personnel matters"; that they were the "key" men on whom depended "the success or failure" of the organization (R. 470, 471, 475, 477).[22] In short, as Dequine admitted, the foremen are "the first contact of your management over the workers" (R. 476). It was these men, as we have seen, who brought the Association into being and kept the "outside" unions out of the plant.

C. THE COMPANY WAS PROPERLY HELD RESPONSIBLE FOR THE ACTIVITIES OF THE SUPERVISORS WHO OPPOSED THE OUTSIDE UNIONS AND CREATED AND ESTABLISHED THE ASSOCIATION

Upon the foregoing evidence concerning the status and duties of the supervisory employees who opposed the Brotherhood and established the Association, the Board found that these men were "management representatives" for whose conduct in matters of union organization the Company was responsible (R. 161–165). It was upon this finding that the Board based its conclusions that the surveillance over the Brotherhood by General Line Foreman Livelsberger and Assistant General Line

[22] Among other things foremen distribute overtime work (R. 210, 417), and select and recommend men for hiring (R. 366) and for transfer (R. 486–487, 584). One superintendent considered it necessary to tell his foremen not "to interfere with the men in any of their rights as are laid out in the Labor Act" (R. 365).

Foreman Carlton constituted interference in violation of Section 8 (1) of the Act (R. 143), that the anti-Brotherhood interrogation by Foreman Harter likewise constituted interference in violation of Section 8 (1) (R. 143–144), and that the concerted sponsorship and establishment of the Association by a large number of the Company's supervisors constituted domination, interference, and support in violation of Section 8 (1) and (2) of the Act (R. 165–166, 168–169).

While the Company concedes (see Brief in Opposition, p. 3) that "several foremen and supervisory employees assisted in the formation of the Association and were members thereof," it has contended that the Board was in error in finding that the supervisors were "management representatives" for whose activities in union matters the Company is answerable. The contention, we submit, is without merit. The Board was clearly entitled to make this finding under well-settled principles, approved by this Court, establishing that an employer may be held responsible for the activities in labor relations of those exercising the prerogatives of management. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 79–81; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518–521; and *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599. See also *National Labor Relations Board* v. *Virginia Electric &*

Power Co., 314 U. S. 469, 471, 474, 477–478; *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282.

In the *Machinists*, *Heinz*, and *Link-Belt* cases this Court held that employer interference may not be delimited or measured by the narrow gauges of express authorization or the rules of *respondeat superior*. It held it to be enough, and that the Board's inference of interference is sufficiently supported, if a showing is made that employees have been given "just cause to believe" that the sponsors of a labor organization "were acting for and on behalf of the management" (the *Machinists* case, at p. 80). That criterion is fully satisfied in the instant case. The Board reasonably concluded (R. 161–165) upon the evidence reviewed above (pp. 21–25) that the positions and authority of the Association sponsors were such as to lead the body of employees to believe that their activities had the support of the Company. The supervisors, as we have shown, clearly exercised general authority over the employees. When ranking members of this group opposed the Brotherhood and contemporaneously a large number of them sought to install an inside union for the express purpose of excluding outside organizations, it seems clear that the employees were in fact constrained by men whom the Company had clothed with the indicia of management, and that the employees were unable to exercise a genuinely free selection between outside

organizations on the one hand and the Association on the other. Just as in the *Machinists* case, the supervisors here "did exercise general authority over the employees and were in a strategic position to translate to their subordinates the policies and desires of the management" (at p. 80). In such circumstances the employees had "just cause to believe" that the sponsors of the Association and the adversaries of outside unions "were acting for and on behalf of the management." The Board therefore properly concluded that the employees were coerced in their choice of unions.

In the court below the Company urged that its top executives maintained a position of neutrality, instructed the heads of departments to refrain from interfering in organizational matters, and did not authorize or sanction the activities of the supervisors. But as we have noted above, this Court has explicitly held that the employer is answerable for the conduct of its supervisors whether or not superior officers gave sanction to their activities. This aspect of the case is controlled by the *Heinz* and *Machinists* cases.

We submit, therefore, that the decisions of this Court are decisive of the Company's contention. No occasion appears for a reexamination of these well-established principles. But even were the issues of original impression, it is plain that these principles are sound and necessary to give full content to the guarantees of the Act. To absolve the

employer from responsibility for interference by those exercising the powers of management because the interference has not been authorized by executives or because responsibility would not be ascribable under the rules of *respondeat superior* is to invite impairment and dilution of the rights of free self-organization. The opportunity would be furnished for bringing to bear upon any single employee the full economic weight of his employer through the activities of those whose suggestions carry the threat of coercive force solely by reason of their position in the hierarchy of management. In such circumstances, the Board would be powerless to prevent invasion of rights which this Court has termed "fundamental." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33.

The proper test of employer responsibility is whether the employer has fulfilled his affirmative obligation to prevent use of his economic power over the employees in such manner as to interfere with their free exercise of the rights guaranteed by the Act. As we pointed out in our brief in the *Machinists* case, No. 16, October Term, 1940, pp. 28 ff., the controlling consideration is not any moral culpability on the part of the employer, but the fact that the employees have been subjected to compulsions based upon the employer's economic power. The Board's obligation and function under the Act is to free employees in the future from

the restraints which destroy freedom of self-organization; the concept of moral culpability on the part of the employer cannot limit exercise of the Board's power and duty to remove restraints which have been in fact imposed.

The fact that the actor has been vested by the employer with authority over other employees is a significant circumstance in determining whether the employees could reasonably regard his actions as those of the employer. The Act proscribes interference by employers because their "suggestions" and "advice" are backed by economic control over the employee's livelihood. As this Court has said, "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." The *Machinists* case, at p. 78. By selecting an employee from among his fellows and vesting him with indicia of authority over them, the employer lends his own prestige to that employee's actions in the eyes of the rank and file employees and strongly suggests that his power stands behind the employee's actions. The investiture of economic power in the hands of subordinates creates the reasonable impression which is the source of the employer's responsibility.

In modern industry, the employer necessarily delegates to a number of employees the power to direct and regulate the work of their fellows, that is, to give orders which are binding under plant

discipline. Authorities in the fields of labor relations and economics are agreed that, to the employee, who rarely comes into contact with higher officials in a large plant, his immediate "boss"—whether he be called "foreman," "supervisor," or another name—represents the management's views and is the means whereby employee opinion can be molded in accordance with those views. "He is the interpreter of the management to the men as well as being the director of production itself."[23] As the means through which tangible contact is made, he "*is* the company."[24] The strawboss and foreman "occupy the diplomatic post of management

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[23] Metropolitan Life Insurance Co., Policyholders' Service Bureau, *Foreman Training Plans* (1929), p. 5. See also Scott, Clothier, and Mathewson, *Personnel Management: Principles, Practices, and Points of View* (1931), pp. 43–44:

"The reason the foreman is the key man is this: regardless of what the administrative policies of the company may be, regardless of the extent to which the foreman properly interprets those policies, the man on the job looks up to him as the *management*. In the mind of the worker, management is fair or unfair in the degree in which his foreman is fair or unfair; intelligent or stupid as the foreman himself is intelligent or stupid; helpful and friendly as the foreman himself is helpful and friendly. The foreman has it in his power thus to modify the company's attitude toward its workers and, consequently, to formulate the workers' attitude toward the company."

[24] Tead and Metcalf, *Personnel Administration: Its Principles and Practice* (3rd ed., 1933), p. 151. See also Anderson, *Industrial Engineering and Factory Management* (1928), p. 39: "At the furthest outpost of management, he *is* management to the workers."

and, as such, are the moulders of worker opinion." [25]

By reason of this strategic location, the employee vested with authority can with facility exercise the employer's directive and disciplinary power so as to give sanction to the policies and desires which he voices. Petty discriminations, each too slight to admit of successful appeal, may readily visit serious discomfort upon opponents.[26] Consequently, the employees tend to "pattern their ideas after his, either because they respect him as a leader or because they wish to keep in his good graces." [27]

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[25] McMurry, *So You Handle People*, in *The Society for Advancement of Management Journal* (Nov. 1937), p. 168. See also Watkins and Dodd, *The Management of Labor Relations* (1938), pp. 436–437:

"The workers look upon him as the official representative of the company, and frequently he is the only representative with whom they ever come in touch. It is natural, therefore, that his words, actions, attitude, and methods should be accepted and interpreted by them as reflecting the established policies and practices of the firm. This may or may not be the case, but the fact that the workers believe it to be so is sufficient to cause misunderstanding."

In Reitell, *How to be a Good Foreman* (1927), p. 5, it is said of this type of employee: "* * * they are right up in the firing line, carrying to every worker the spirit and the underlying policy of the concern." Concerning the tendency of ordinary employees to follow an immediate leader's example, see Allen, *The Foreman and His Job* (1922), pp. 7–8.

[26] Slichter, *The Turnover of Factory Labor* (1919), p. 390. See also, W. L. MacKenzie King, *Industry and Humanity* (1935), pp. 129–130; Hepner, *Human Relations in Changing Industry* (1934), p. 124.

[27] National Metal Trades Ass'n, Committee on Industrial Education, *Foremanship; Presenting the Fundamental Principles of Practical Foremanship* (1928), pp. 3–4.

The ultimate responsibility is the employer's; he has clothed the supervisor with power to inflict hardship and has therefore lent to his suggestions an implied threat of oppression.[28]

These principles are illustrated in the instant case. Foreman Harter, when he initiated the Association in order to oppose the outside union campaign (*supra*, p. 14), enlisted the aid of other foremen as organizers specifically because he "figure[d] that your men look to the foreman as a leader" (R. 515–516, 530). Similarly, when one of the employees became aware that Foreman Livelsberger and Carlton were subjecting the Brotherhood meeting to surveillance (*supra*, p. 12), his immediate reaction, in order to avoid their displeasure, was "to get out of there" (R. 349). Superintendent Dequine, testifying about foremen in the Company's system, declared that the foreman was "the first contact of your management over the workers" (R. 476). He also stated that the foreman is the "key man [who] is the success or failure of your organization" (R. 475). And the bylaws committee of the Association clearly recognized the compulsions which foremen exercise when it stated that foremen ought "not take too active part in the organization so as to make men working under them feel the union was run by higher-ups" (R. 710).

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[28] Compare U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 634, *Characteristics of Company Unions* (Govt. Print. Off., 1935), pp. 8–9.

Plainly, therefore, when a large number of foremen and other supervisors suddenly banded together, as they did here, and in a quick campaign formed the Association for the admitted purpose of excluding other organizations, the men under them were forcibly and concretely impressed concerning which organization their immediate superiors expected them to join. It is not surprising that only four days after the first projection of the Association by Foreman Harter and his foremen associates, some 600 employees attended a mass meeting called by the Association and became members (*supra*, p. 16, R. 738–785).

On these facts the Board reasonably found that "management representatives" coerced employees in regard to membership in the Brotherhood, that "management representatives" likewise formed, installed, and led the Association, and that the Company is answerable for their activities (R. 161–165). The conclusion follows that the Company engaged in interference, coercion, and restraint in violation of Section 8 (1), and dominated, interfered with, and supported the Association in violation of Section 8 (2).

II

THE COURT BELOW ERRED IN REMANDING THE CASE TO THE BOARD FOR THE TAKING OF ADDITIONAL EVIDENCE CONCERNING UNLAWFUL CONDUCT OF THE BROTHERHOOD AND ITS OFFICERS

The court below did not pass upon the issue whether there was substantial evidence to support

the Board's findings that the Company had committed unfair labor practices within the meaning of Section 8 (1) and (2) of the Act. Instead the court granted the Company's petition (R. 852–855), filed under Section 10 (e) of the Act, to refer the case back to the Board and order the taking of additional evidence relating to the destruction of the Company's property by the Brotherhood or its agents or representatives (R. 876). The court below reached this result on two apparently independent bases: (1) that the allegations of the Brotherhood's misconduct were relevant to the Board's jurisdiction to receive and act upon the charges filed by the Brotherhood's representative (R. 874–875); and (2) that the allegations of misconduct of the Brotherhood's agents or representatives were relevant to the credibility of certain witnesses who testified on behalf of the Board (R. 873–874, 876).[29]

[29] The court below also apparently suggested that the allegations of misconduct were relevant to the issue whether the Association was company-dominated (R. 876); it did not disclose the basis of its suggestion. In its brief in opposition to the petition for certiorari (p. 14), the Company sought to sustain the court's suggestion on the ground that the evidence of misconduct "would be a confirmation of the fears and suspicions which the employees very properly had in their minds and which was the moving cause of their forming their own union rather than allying themselves with persons that they had good reason to suppose used unlawful measures." The short answer to this contention is that at no time prior to its brief in opposition did the Company advance this as a ground for the taking of additional evidence; neither its petition to reopen filed with the Board (R. 130–135) nor its petition to remand filed with the court below

It is our position that neither of these grounds supports the conclusion of the court below that the case must be remanded for the taking of additional evidence. Insofar as the proffered evidence relates to the misconduct of the Brotherhood as an asserted disqualification to file charges, it is, as a matter of law, wholly irrelevant to the issues in this case. Insofar as such evidence relates to the credibility of witnesses, the testimony of such witnesses is either cumulative or irrelevant so that remand is unwarranted.

A. THE ADDITIONAL EVIDENCE IS IRRELEVANT TO THE ISSUE OF THE BOARD'S JURISDICTION SINCE THE BOARD'S JURISDICTION IS UNAFFECTED BY A CHARGING UNION'S UNLAWFUL CONDUCT

The holding of the court below that the proffered evidence relating to the Brotherhood's misconduct

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(R. 852–855) suggested that the evidence sought to be adduced would be relevant or material within the meaning of Section 10 (e) to the reasons for the creation and organization of the Association. And, although those active in the creation and organization of the Association testified to their reasons for their interest in an unaffiliated union (R. 200, 214, 223, 351, 393, 405, 490–491, 498–499, 581), the record is barren of any suggestion that suspected (but not yet occurring) misconduct of the Brotherhood was a factor leading to the activities of the organizers of the Association. If this were a factor, no reason is advanced for the Company's failure to have adduced evidence concerning it and, accordingly, Section 10 (e) precluded the petition to reopen and remand. And in any event, as we have stated, the Company did not at any time, even subsequent to the hearing, offer to prove that distaste for the Brotherhood's asserted tendency toward unlawful activities motivated the organization of the Association.

was relevant to the Board's jurisdiction was based on its view (a) that such evidence was material to establish whether the Brotherhood was capable of acting as a bargaining representative for employees and was, therefore, a labor organization; (b) that, if the evidence were true, the Brotherhood was not a labor organization and was incapacitated from acting as bargaining representative; (c) that, if so incapacitated, the Brotherhood could not file a charge with the Board; and (d) that, if the Brotherhood were disqualified from filing a charge, the Board lacked jurisdiction to proceed (R. 872–875). In sum, the court below held that the Board has no jurisdiction if the charge upon which the Board's complaint is issued is filed by an organization which can be shown to have engaged in unlawful conduct. We submit, however, that the basic assumptions of the court below (R. 874–875), (1) that the right to file a charge is limited to labor organizations as defined in Section 2 (5) of the Act or employees as defined in Section 2 (3), and (2) that labor organizations or employees guilty of illegal conduct lose their right to institute action before the Board, are in error. Accordingly, the Board is not without jurisdiction because of the illegal conduct of those who, by filing charges, invoke its machinery.

Initially it is important to note that the basic issues in the case before the Board were whether the Company had interfered with its employees' rights of self-organization, and whether it had

dominated, supported, or interfered with the administration of the Association. Accordingly, upon finding in the affirmative on these issues, the Board ordered the Company to cease and desist and to disestablish the Association. The charging union—either the local or its parent body—was nowhere even mentioned in the order. It is, therefore, our position that in the circumstances of this case the proffered evidence of the Brotherhood's unlawful conduct was irrelevant to the basic issues. For whatever may be the relevancy of a charging union's misconduct as it affects the discretion of the Board in its choice of remedial orders, it plainly cannot deprive the Board of jurisdiction altogether, nor can it affect the findings when the issue is whether or not Section 8 (1) and (2) has been violated. If the question were whether the Company is required to bargain collectively with the Brotherhood, or if it were whether employees connected with the misconduct are entitled to reinstatement, the evidence sought to be adduced by the Company would present a different issue relating to the remedy. Cf. *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 257–259; *National Labor Relations Board* v. *Federal Bearings Co.*, 109 F. (2d) 945 (C. C. A. 2). Here, however, the central issue is whether the Company violated Section 8 (1) and (2); whether, in short, the Company interfered with the employees' right of

self-organization and whether the Association is a company-dominated organization which should be disestablished. It would seem clear that the Brotherhood's misconduct is in no way relevant to this issue and that such misconduct cannot operate to deprive the Company's employees of their protection against violators of Section 8 (1) and (2).

1. As we have noted above (p. 37), the court below assumed that only a "labor organization" as defined in Section 2 (5) or "employees" as defined in Section 2 (3) may file charges with the Board. While we submit that this assumption is erroneous (*infra*, pp. 40–48), in any event, it is plain that even if the conclusion of the court below—that there are these limitations upon the right to file charges—were warranted, the charges here filed would have fallen within the limitations. For a union is not the less a "labor organization" because its officers or members engaged in illegal conduct. Without question, the Brotherhood is a "labor organization" within the meaning of Section 2 (5) since it clearly exists "for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[30] Accordingly, the Board's

[30] Section 2 (5) provides:

"The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which ex-

finding that the Brotherhood "is a labor organization" (R. 141) is not open to rational challenge and cannot be affected by any evidence of its misconduct."

2. But even were it assumed, as did the court below, that a union guilty of misconduct is not, because of its misconduct, a "labor organization" within the meaning of Section 2 (5) of the Act, it does not follow that it is precluded from filing charges with the Board. Both the terms of the Act and its legislative history negate the conclusion that the right to file charges is limited to "labor organizations" as defined in Section 2 (5) or "employees" under Section 2 (3).

Section 10 (b), providing for the filing of charges, is wholly without limitation. It provides that—

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue * * * a complaint * * *.

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ists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

[11] Indeed, the Board in its decisions has customarily found, as it did in regard to the Association in the instant case (R. 141), that even a company-dominated labor organization existing in violation of Section 8 (2) is a labor organization within the meaning of Section 2 (5). *Third Annual Report of the National Labor Relations Board* (Gov't Printing Office, 1939), p. 110.

Congress, therefore, prescribed only that a charge be filed; it imposed no restrictions [32] and omitted any requirement that the charge be filed by a labor organization or an employee. Similarly, the Board's Rules and Regulations, adopted pursuant to Section 6 (a) of the Act, have always permitted the filing of charges "by any person or labor organization" [33] (Rules and Regulations of the National Labor Relations Board, Article II, Section 1, Appendix A, *infra*, p. 56). And these rules have been uniformly interpreted by the Board so as not to restrict the class of persons or organizations qualified to file charges. *Matter of Pennsylvania Greyhound Lines, Inc.*, 1 N. L. R. B. 1, 45 (1935), Board's order enforced, 303 U. S. 261, 272; [34] *Mat-*

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[32] Compare, for example, the Chandler Act, in which Congress expressly limited the class of persons who may invoke the remedies provided, and the situations in which they may do so. Sections 141 and 146 of the Bankruptcy Act, 11 U. S. C., secs. 541 and 546.

[33] "Person" is defined by Article I, Section 1, of the Rules and Regulations, to be the same as in Section 2 (1) of the Act, and thus to include "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." The Brotherhood plainly falls within this comprehensive definition.

[34] In its brief filed with this Court, the employer in the *Pennsylvania Greyhound* case similarly contended for a restriction upon who may file charges, arguing that those who filed charges in that case had no interest in the proceedings and were not representative of the employees (pp. 2–8), while the Government in its brief (pp. 53–54) contended for a broad interpretation entitling any person to file charges. The Court, without discussion, upheld the Government's contention. 303 U. S., at p. 272.

ter of Superior Tanning Co., 14 N. L. R. B. 942, 945 (1939) (Board's order enforced with modification, 117 F. (2d) 881, 883 (C. C. A. 7), certiorari denied, 313 U. S. 559); *Matter of Jefferson Lake Oil Co., Inc.*, 16 N. L. R. B. 355, 356 (1939); *cf. Matter of Vincennes Steel Corp.*, 17 N. L. R. B. 825, 826–827 (1939) (Board's order enforced with modification, 117 F. (2d) 169, 170–171 (C. C. A. 7)); *Matter of Inland Lime & Stone Co.*, 24 N. L. R. B. 758, 759 (1940) (Board's order enforced, 119 F. (2d) 20 (C. C. A. 7)).

The conclusion that the rule sought to be imposed by the court below—that misconduct deprives an organization of the requisite status to file charges—may not be read into the Act is reinforced by the Act's legislative history. The report of the Senate Committee establishes that Congress deliberately rejected proposals to regulate the conduct of unions and to prohibit union violence; the Committee declared that other remedies against such conduct were already adequate and available outside the framework of the Act,[35] and that "the only results of introducing proposals of this sort into the bill * * * would be to overwhelm the Board in every case with countercharges and recriminations that would prevent it from doing the task that needs to be done." S. Rep. No. 573, 74th Cong., 1st Sess., pp. 16–17, also

[35] Indeed, these remedies outside the framework of the Act were invoked in this case. The illegal conduct was squarely dealt with in the state courts and those found guilty were punished (R. 852).

incorporated in H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 16–17. And yet the decision below would require precisely the result sought to be avoided by Congress since it directs the Board to investigate asserted misconduct of the charging union as a prerequisite to the taking of jurisdiction.

Nor is there anything in the Act's legislative history which deprives Section 10 (b) of its clear meaning (*supra*, pp. 40–41) that anyone—not merely a labor organization or employee—may file a charge.[36]

3. Even if the language and history of the Act less explicitly compelled the conclusion that the Board was entitled to proceed upon the basis of the Brotherhood's charges irrespective of that organization's misconduct, other basic considerations relating to the Act would lead to the same conclusion.

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[36] At the hearings before the Senate Committee, Senator Wagner, the sponsor of the Act, strongly objected to a proposal which would have limited the classes of persons eligible to file charges to "persons who are connected with the plant." Hearings before the Committee on Education and Labor, United States Senate, 74th Cong., 1st Sess., on S. 1958, Washington, Government Printing Office, Part 3 (1935), pp. 439–442. The proposed restriction was not incorporated in the Act.

The Attorney General's Committee on Administrative Procedure, which made a comprehensive study of the National Labor Relations Board and of other administrative agencies, has flatly stated that "No limitations have been imposed, either by statute or by the Board's ruling, on the classes of persons who may file charges." *Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, Part 5, National Labor Relations Board*, Washington, Government Printing Office, 1941, p. 3.

One such basic principle emphasized by this Court is the public nature of the rights protected by the Act. See *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362–364, 366; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 193; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265–269. As stated in the *Amalgamated Utility Workers* case (pp. 264–265), the charging union does not "become the actor in the proceeding. * * * The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." Yet the conclusion of the court below that the Board, by reason of the charging union's misconduct, was helpless to proceed to the correction of the unfair labor practices, substitutes a private for a public interest. The public interest in the suppression of unfair labor practices and the consequent prevention and removal of obstructions to interstate commerce are wholly subordinated, under the doctrine of the court below, to the private rights of the charging union. Unfair labor practices would be left unrestrained, obstructions to commerce unremoved, and the employees of the Company not even members of the Brotherhood unprotected, because of the wrongdoing of the Brotherhood although it is not the "actor in the proceeding."

The purpose of a charge is simply to inform the Board of the alleged existence of unfair labor practices. Since the Board does not initiate the proceeding through the issuance of a complaint until it has exhaustively investigated the charge, no occasion arises for restricting the class of those who set the investigatory processes in motion. Cf. *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. (2d) 38, 42 (C. C. A. 6); *Matter of Shell Petroleum Corp.*, 10 N. L. R. B. 719, 720. Once the charge has been filed, the succeeding phases of the case—investigation, issuance of the complaint, adjudication, and order—are the responsibility of the Board in pursuance of its duties in the public interest. The jurisdiction of the Board to execute these duties cannot be ousted by the motives or the nature of the person or group of persons who files the charges.

Nor is there warrant for the view of the court below that its conclusion is required by the policy of the Act in favor of peaceful resolution of industrial disputes. On the contrary, the rule of the court below would remit resolution of employer-employee disputes arising from unfair labor practices to the primitive method of economic force. On the one hand, the employees would be precluded from recourse to the peaceful redress provided by the Act and would be left to no recourse but submission or strike; on the other hand, the employer's unfair labor practices would be immunized and the very

unfair conduct sought to be terminated by the Act would be encouraged. Those situations in which the need for the Act is most urgent would be outside its operation. This is not to say that the objective of the Act to achieve peaceful resolution of disputes would be advanced by requiring the reinstatement of serious law violators, or by requiring an employer to deal with a union guilty of grave and permeating illegal conduct. But upon such issues, as we have noted (*supra*, p. 38), the question is one of appropriate remedy. The view of the court below, however, is without force when, as here, it is directed to the issue of whether the Board has jurisdiction to hear and determine the case at all.

4. Although no decision has dealt expressly with the effect of union misconduct upon a union's right to file a charge with the Board, or the Board's jurisdiction to proceed upon charged filed by a union which has engaged in misconduct, a number of decisions by this Court and by circuit courts of appeals substantially support our contention that the decision of the court below is erroneous. Board orders have often been enforced despite asserted misconduct of the union which had invoked the processes of the Board by filing a charge. *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31; *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658, 661, 663 (C. C. A. 9); *National Labor*

Relations Board v. *Remington Rand, Inc.*, 94 F. (2d) 862, 872–873 (C. C. A. 2), certiorari denied, 304 U. S. 576; *Wilson & Co.* v. *National Labor Relations Board*, 103 F. (2d) 243, 244, 251 (C. C. A. 8); *Tyne Co.* v. *National Labor Relations Board*, 125 F. (2d) 832, 835, 836 (C. C. A. 7).[37] In the *Fansteel* case, for example, although the charging union and the employees were found to have engaged in unlawful conduct of a serious character, this Court nevertheless enforced the provision of the Board's order requiring the company to cease and desist from certain unfair labor practices and to disestablish the company-dominated union. Similarly, in the *Southern Steamship* case, the Court's enforcement of certain portions of the Board's order necessarily assumed that the Board had jurisdiction despite the employees' violation of law.[38]

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[37] See also *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138, 146 (C. C. A. 9), certiorari denied, 304 U. S. 575, 99 F. (2d) 533, 540, certiorari denied, 306 U. S. 646; *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 39 (App. D. C.), affirmed 311 U. S. 72. Cf. *National Labor Relations Board* v. *Blanton Co.*, 121 F. (2d) 564, 568–569 (C. C. A. 8); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 885–886 (C. C. A. 1), certiorari denied, 313 U. S. 595.

[38] Similarly, the circuit courts of appeals have consistently assumed that the alleged misconduct of the charging union does not bar its resort to the Board for removal of unfair labor practices. In *Wilson & Co.* v. *National Labor Rela-*

We submit, therefore, that the conclusion of the court below that the Brotherhood, because of its misconduct, would be disqualified from filing charges with the Board and that therefore the Board would have no jurisdiction to proceed in this case, is contrary to the terms, the history and the general policies of the Act, and to the uniform course of decisions of this and other courts.

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tions Board, 103 F. (2d) 243, 244, 251 (C. C. A. 8), the company contended (though the official report does not set it forth *in extenso*) that the labor organization which had filed the charges had engaged in threats and violence and that, therefore, the charge was improperly filed and the Board was without jurisdiction. The court held that nevertheless the union was a labor organization and the proceedings were properly instituted. The same contention with respect to a successor of the charging union in the first *Wilson* case was rejected without comment in *Wilson & Co.* v. *National Labor Relations Board*, 123 F. (2d) 411, 413 (C. C. A. 8). Again, in *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658, 661, 663 (C. C. A. 9), the court overruled the employer's contention that because the charging union had allegedly engaged in unlawful acts and had unclean hands, it was barred from proceeding before the Board. So, too, the Second Circuit in *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 872–873, certiorari denied, 304 U. S. 576, expressly held that it was no defense for the employer to assert that the charging union had "disqualified itself by its own misconduct from appealing to the Board". In *Tyne Co.* v. *National Labor Relations Board*, 125 F. (2d) 832, 835, 836 (C. C. A. 7), the court held that "whether the [charging] Union * * * was a fit one for [the company's] employees to join, or whether it was engaged in efforts to destroy [the company's] business, seem not to be justiciable questions in cases of this kind."

B. THE ADDITIONAL EVIDENCE DOES NOT WARRANT REMAND ON THE ISSUE OF CREDIBILITY OF WITNESSES SINCE THE TESTIMONY OF THE WITNESSES WAS CUMULATIVE OR IMMATERIAL

As a second ground for remanding this case, the court below held (R. 873–874, 876) that the proffered evidence concerning the destruction of the Company's property might result in impeachment of three witnesses, Samuel Guy, John R. Marks, and Earl Freeman, upon whose testimony the Board assertedly relied in making its ultimate findings. We submit that the remand on this ground was not justified, since the record establishes that the evidence which these witnesses gave was either cumulative (being corroborated by the Company's and other witnesses), or entirely immaterial to the Board's findings and conclusions and not relied on by the Board.

Marks and Freeman were alleged to have participated in the crimes. But the Board did not rely on their testimony or even deem it of sufficient consequence to designate it for printing (see R. 8–19). Examination of the few pages of their testimony included in the record by the Company shows, in addition, that it was immaterial to any issue in the case; the gist of this testimony, if relevant at all, was favorable rather than adverse to the Company's case (see R. 188–191, 276). Although the court below (R. 876) referred to testimony by Guy and Marks concerning a statement by English, the Company's vice-president, and apparently predi-

cated its decision at least in part upon the assumption that this evidence was germane to the Board's decision, the Board made no finding and relied in no way on such testimony, and the printed record contains no such testimony by Marks at all (R. 188–191). And the testimony plainly is not relevant to the central finding of domination of the Association (see R. 179–188). In these circumstances, it is apparent that impeachment of Marks and Freeman could not affect the Board's decision, and that remand could serve no end other than delay. Cf. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 247; *National Labor Relations Board* v. *M. A. Hanna Co.*, 125 F. (2d) 786, 789 (C. C. A. 6).

Similarly remand in respect of Guy is not warranted by the circumstances.[39] Guy testified (R. 180–182) concerning the conduct of two supervisors who remained outside a building in which a meeting of the Brotherhood was being held. His testimony was substantially corroborated by the testimony of Livelsberger and Carlton, the two supervisors, who were both Company witnesses (R. 480–481, 576–578) and by two other witnesses (R. 277–278, 348–350).[40] It is plain, therefore,

[39] There is no allegation that Guy was charged with or convicted of any crime in connection with the destruction of the Company's property.

[40] Guy testified that during the Brotherhood meeting, Livelsberger and Carlton were sitting in a car outside the meeting place, that Hoblitzel was also in the car, that Guy

that Guy's testimony was cumulative. And since Guy was not one of the persons arrested, charged with, or convicted of, any criminal conduct (See R. 873) the remand, so far as appears, would not bear upon his credibility in any case, apart from the fact that his credibility is of no substantial importance.

Remand on this ground is also in conflict with the rule that "newly discovered evidence merely to contradict a witness is not sufficient * * * to warrant a new trial." *Shelton* v. *Southern*

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invited Livelsberger and Carlton in to the meeting to get "firsthand information," and that Carlton replied that "he would get that information anyway" (R. 180–182). Livelsberger testified that he had heard of the Brotherhood meeting, that he considered it to be "open," that he went to the meeting place "to see who was who," that he did not go in because he saw no one "that I cared much about associating in membership with," that he remained outside in a car with Carlton and Hoblitzel, and that Guy invited Carlton to attend the meeting (R. 480–481). Carlton testified that he was invited to attend the meeting, that he wanted "to see what was going on, for my own benefit," that he did not go in because he saw only a few of his crew, that he remained with Livelsberger and Hoblitzel in a car outside the building, that Guy asked him in, and that he refused but he did not "think" that he said that he "would have the information anyway" (R. 576–578). Hoblitzel testified that Carlton and Livelsberger were outside, that Guy invited Carlton in to "find out firsthand what they [the Brotherhood] had to offer," and that Carlton refused, saying that "he didn't have to attend the meeting to get the information firsthand, he would get it in the morning" (R. 278). Claeys testified that he saw Livelsberger, Hoblitzel, and Carlton in a car outside the meeting place but heard no conversation (R. 348–350).

Ry. Co., 255 Fed. 182, 183 (E. D. Tenn., Judge Sanford).[41] Accordingly, even were the testimony of Guy, Marks and Freeman less clearly immaterial to the issues, remand in this case would be unjustified, since the credibility of these witnesses had already been subjected to test by cross-examination. The court below has recognized that "Newly discovered evidence which tends merely to affect the weight and credibility of evidence does not constitute proper basis for a new trial." *Morton Butler Timber Co.* v. *United States*, 91 F. (2d) 884, 893 (C. C. A. 6); *Miller* v. *Commonwealth of Kentucky*, 40 F. (2d) 820, 822 (C. C. A. 6); see also *Chambers* v. *Anderson*, 58 F. (2d) 151, 154 (C. C. A. 6) and cases cited therein. This rule would seem to have particular cogency where, as here, the testimony of the witnesses sought to be impeached had no effect upon the decision.

CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed, and the cause re-

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[41] See also *Casey* v. *United States*, 20 F. (2d) 752, 754 (C. C. A. 9), affirmed, 276 U. S. 413; and *Slappey* v. *United States*, 110 F. (2d) 528 (C. C. A. 5). Accord: *National Labor Relations Board* v. *J. S. Popper, Inc.*, 113 F. (2d) 602, 604 (C. C. A. 3); *United States* v. *Parker*, 103 F. (2d) 857, 863–864 (C. C. A. 3), certiorari denied, 307 U. S. 642; *Lowry* v. *Mt. Adams, etc., Ry. Co.*, 68 Fed. 827, 829 (C. C. S. D. Ohio); *Brooke* v. *Peyton*, 4 Fed. Cas. No. 1934; *Carr* v. *Gale*, 5 Fed. Cas. No. 2433. Cf. *Taylor* v. *United States*, 19 F. (2d) 813, 817 (C. C. A. 8); *Brown* v. *United States*, 32 F. (2d) 953, 954 (App. D. C.).

manded with directions to enforce the order of the Board in full except that the notices provision should be modified as consented to by the Board.

CHARLES FAHY,
Solicitor General.
RICHARD S. SALANT,
Attorney.

ROBERT B. WATTS,
General Counsel,
ERNEST A. GROSS,
Associate General Counsel,
MORRIS P. GLUSHIEN,
HILDA D. SHEA,
Attorneys,
National Labor Relations Board.

OCTOBER 1942.

APPENDIX A

I

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this act—

* * * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * *

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interefere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

* * * * *

SEC. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

* * * * *

(e) * * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence,

shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

2

Rules and Regulations of the National Labor Relations Board:

ARTICLE II

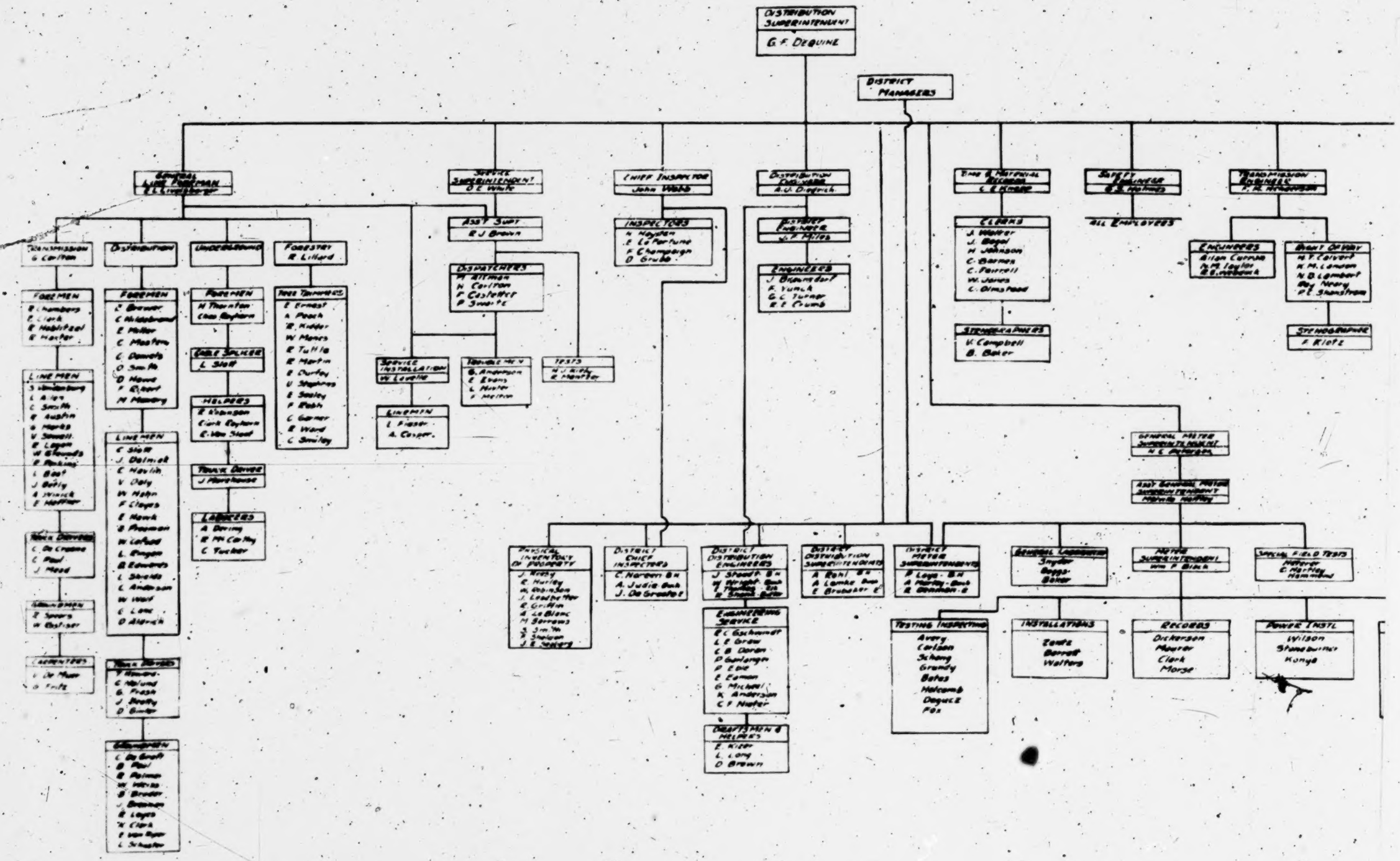
* * * * *

SECTION 1. A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person or labor organization. * * *

APPENDIX B

RESPONDENT'S EXHIBIT 17

U. S. GOVERNMENT PRINTING OFFICE: 1943


DISTRIBUTION SUPERINTENDENT
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DISTRICT MANAGERS
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SERVICE SUPERINTENDENT
O. E. White
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LABORERS
A. Boring
R. McCarthy
C. Tucker
FORESTRY
R. Lillard
TREE TRIMMERS
E. Ernest
A. Peach
R. Hidder
W. Meyers
R. Tuttle
R. Martin
E. Durfey
V. Stephens
E. Seeley
F. Rush
C. Garner
R. Ward
C. Smiley
SERVICE INSTALLATION
W. Laughlin
LINEMAN
L. Fisher
A. Cooper
TROUBLE MEN
B. Anderson
E. Evans
L. Hunter
J. Melton
TESTS
W. J. Kirby
E. Hunter
FOREMEN
R. Chambers
P. Clark
R. Hobilzel
R. Hunter
LINEMEN
S. Vandenburg
L. Allen
C. Smith
R. Austin
G. Harris
V. Sewell
E. Logan
W. Edwards
P. Perkins
L. Best
J. Bailey
A. Wenick
E. Hoffner
TRUCK DRIVERS
C. De Crosne
C. Paul
J. Hood
GROUNDMEN
T. Sears
W. Costner
APPRENTICES
L. De Muer
O. Fritz
FOREMEN
L. Brewer
C. Hildebrand
E. Miller
C. Masters
C. Daniels
O. Smith
D. Howe
F. Ehlert
M. Mowery
LINEMEN
C. Stoff
J. Dolmet
C. Havlik
V. Daly
W. Hahn
F. Cloyes
E. Hawk
B. Freeman
W. Lofland
L. Ringer
B. Edwards
L. Shields
C. Anderson
W. Wolf
C. Lane
O. Aldrich
TRUCK DRIVERS
F. Hansen
C. Nelund
G. Frash
J. Bailey
D. Bunker
GROUNDMEN
C. De Groff
B. Paul
E. Palmer
W. Hines
B. Binder
J. Brennan
R. Lloyd
N. Clark
F. Van Riper
L. Schuster
PHYSICAL INVENTORY OF PROPERTY
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R. Hurley
W. Robinson
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A. La Blanc
M. Barrows
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S. Shelton
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D. Gulonga
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E. Eaman
G. Michael
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DISTRICT METER SUPERINTENDENTS
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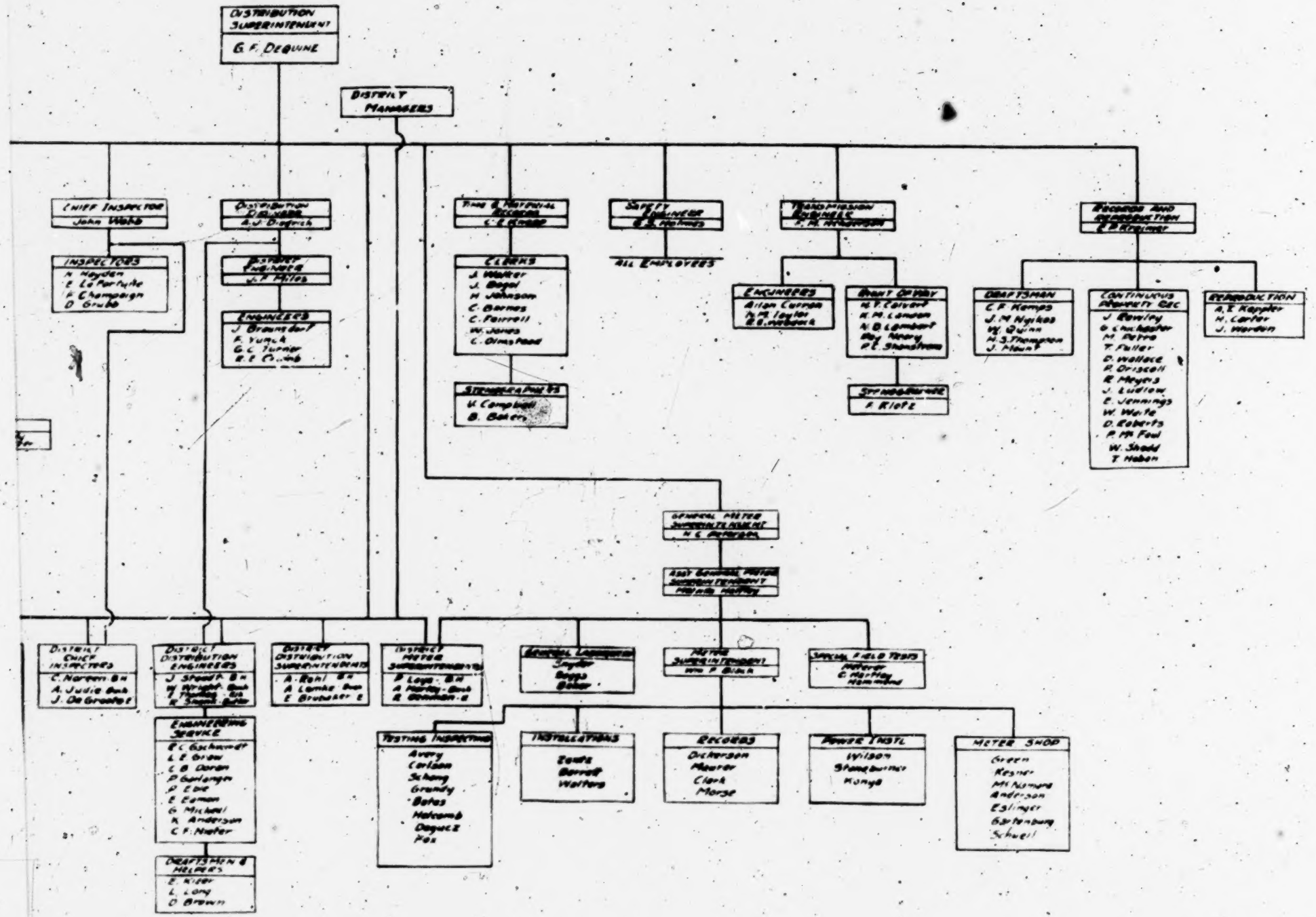
A. Hurley - Bak
R. Goodnow - E
GENERAL METER SUPERINTENDENT
W. C. Peterson
ASST GENERAL METER SUPERINTENDENT
Marvin Hurley
GENERAL LABORATORY
Snyder
Beggs
Baker
METER SUPERINTENDENT
John P. Black
SPECIAL FIELD TESTS
Hefner
C. Hurley
Hamilton
TESTING INSPECTING
Avery
Carlson
Schang
Grundy
Bates
Holcomb
Doyuce
Fox
INSTALLATIONS
Zentz
Barrett
Walters
RECORDS
Dickerson
Maurer
Clark
Morse
POWER INSTL
Wilson
Shoneburner
Konya



NATIONAL LABOR RELATIONS BOARD
CASE NO. C-[illegible] EXHIBIT NO. 17
IN THE MATTER OF [illegible]
DATE 5/3/[illegible] WITNESS [illegible]
DAVID P. BURG, Official Reporter
BY [illegible]

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